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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. _____

THOMAS FARROW, JR.,

Petitioner,

vs.

STATE OF NEW JERSEY,

Respondent.

On Petition for Writ of Certiorari to the Supreme Court of New Jersey

Preliminary Statement

Petitioner has filed a petition for a writ of certiorari to review the judgment of the New Jersey Supreme Court entered September 8, 1972, which affirmed a judgment of conviction of murder in the first degree entered against petitioner in the Passaic County Court, Law Division (Criminal) on March 19, 1970. Previously, on February 1, 1972, the New Jersey Supreme Court had ordered that a sentence of death imposed on petitioner be reduced to a

term of life imprisonment, in accordance with its finding in *State* v. *Funicello,* 60 N. J. 60 (1972) that the death penalty provided by N.J.S. 2A:113-3 and 4 was unconstitutional.

The decision of the New Jersey Supreme Court in this matter has been set out in a comprehensive and detailed written opinion which has been officially reported in 61 N. J. 434 (1972), and which is attached as "Appendix A" to the petition filed. Much of the factual background relevant to the resolution of the legal issues presented has been included in that opinion. Reference to certain of the evidence adduced at the trial has been included by petitioner in the Statement of the Case and in "Appendix B" to his petition. We likewise will set out those additional and repetitive facts which we believe pertinent to the questions presented by the petition.

We take issue with the contentions advanced by petitioner as the reasons for granting the writ, and we urge that the "Questions Presented" by the petition be answered in the negative. Our position is that the affirmance by the New Jersey Supreme Court of the conviction entered in the trial court was correct, that the trial proceedings were conducted in accordance with due process of law, and that there is no actual basis presented for this Court to grant a writ of certiorari.

Factual Background

The trial of petitioner for the robbery-murder of an aged grocer, Isadore Herman, at which time the victim's wife was also shot three times: did not present any close issue with respect to the petitioner's involvement as one of the perpetrators. Various elements of the State's case have been recounted in the opinion of the New Jersey Su-

preme Court, which referred to the totality of the evidence as "approaching the overwhelming."

Two of the State witnesses, Paul Shaver and William McCallum, identified petitioner as the person who had invited them to "case" the residence of the victim less than a month before the actual incident, which coincided in its execution with the various suggestions made by petitioner as to how such an operation would have to be conducted. Witness McCallum knew petitioner for years, and his identification of petitioner as having been involved in that surveillance could not be questioned. His testimony concerning the details of the surveillance were corroborated by witness Shaver, whose subsequent photographic identification of petitioner is one of the issues raised by petitioner herein.

Another State witness, Eugene Edwards, who knew petitioner for some time, testified at trial that petitioner had told him on two consecutive nights preceding the murder that he was going to "steal something . . . [and obtain] a nice piece of money tomorrow night." Edwards testified further that following the shooting that night, petitioner told him that the had just "killed a guy", and the following day repeated that he had killed the grocer, pointing to a newspaper account of the murder. This witness also testified that a short time prior to the killing, petitioner had shown him a Smith & Wesson .38 calibre revolver, the type later shown to have been used in the shooting. Additionally, Edwards recalled that a few days after the murder, he had been requested by petitioner who was temporarily detained, to go to his home and tell his mother to destroy all of petitioner's clothes obtained from an out-of-state haberdasher whose name was found in the hatband of a hat dropped by one of the perpetrators at the crime scene. An imitation badge which wit-

ness McCallum said was "just like" one Farrow had prior to the shooting, was also found dropped at the victim's apartment.

Witness McCallum, like Edwards, also testified that petitioner had after the incident admitted to him he had shot the grocer when the latter had resisted the robbery attempt. A third State witness, Frank Forte, likewise testified as to petitioner's statements and conduct which were consistent with an admission of involvement.

In addition to this damaging evidence, the State also produced two witnesses who testified that they saw petitioner, with another, leaving the crime scene immediately after the shooting. This subsequent photographic and in-person identification of petitioner as one of the actual perpetrators forms the primary basis for his petition herein, and will be discussed *infra.*

Petitioner did not take the stand at his trial. He did call two witnesses to attempt to establish that he was at a bar during the time when the robbery-murder occurred. Previously, on the State's case, Eugene Edwards had testified that he had been with petitioner at a fashion show at a bar earlier that evening, but that he did not see petitioner there during the time when the shootings occurred at the Herman residence, a relatively short distance away.

The trial took some thirteen days, exclusive of jury selection, the jury returning a verdict of guilty of first degree murder without a recommendation of life imprisonment.

ARGUMENT

POINT I

Photographic identification of petitioner by each of three State witnesses was not impermissibly suggestive, and evidence thereof was properly admitted against petitioner.

Petitioner suggests in his petition that the New Jersey Supreme Court has not properly been applying the test laid down by this Court in *Stovall* v. *Denno*, 388 U. S. 293 (1967) and *Simmons* v. *United States*, 390 U. S. 377 (1968) with respect to the admissibility of out-of-court photographic identifications, and that evidence of such identifications of petitioner by three State witnesses should have been excluded because in each instance the procedure was impermissibly suggestive.

Our contention is that the New Jersey Supreme Court has correctly stated the test to be employed, in its reported opinion in this matter, and properly applied that test to the facts as appearing in the record of the proceedings below.

Petitioner complains that the photographic identification made by Paul Shaver should have been excluded, because it was unduly suggestive. It should be noted that his identification related to petitioner's presence in the area of the holdup attempt a few weeks prior to the murder, rather than on the date of the shooting. It should further be emphasized, as pointed out in the opinion of the New Jersey Supreme Court, that the events of that incident, when petitioner, Shaver, McCallum and one other person "cased" the premises and petitioner discussed his plan to rob the Hermans, were positively confirmed by McCallum, who

was familiar with petitioner for several years. Thus the possibility of a misidentification of petitioner by Shaver was non-existent.

Additionally, it was Shaver who on his own initiated and directed police suspicion towards petitioner. On the day following the shooting, Shaver called an F.B.I. agent whom he knew, to report the incident above referred to because he was fearful he himself may have been implicated in the killing. He described this incident to the agent, and described the "Sonny" whom he later identified as petitioner. The agent that same date went to the police headquarters of the municipality where the crime had occurred, and where petitioner lived, and obtained a photograph of petitioner, who was in fact known to the police and his acquaintances as "Sonny", (Petitioner had a previous record of involvements with the law).

This volunteered information by Shaver was the first indication to any of the authorities that petitioner may have been involved in the shooting. When the F.B.I. agent obtained the photograph of "Sonny Farrow" from the Passaic police, and showed it to Shaver, the latter identified it as being "identical to the person he knew as 'Sonny'."

At that time, the police investigation of the crime had barely begun, and had not narrowed to any conclusive degree as to any individual. In fact, petitioner was not even indicted until many months later, when information provided by witnesses having nothing to do with the photographic identification, was first uncovered.

The initial photographic identification by Shaver was made at a time when the F.B.I. agent, who was not even directly involved in the investigation of a non-federal offense, was attempting to ascertain whether Shaver's iden-

tification would involve any known individual. The investigation of a possible initial suspect had to begin somewhere.

The presence of petitioner at the scene at the time of the murder was testified to by State witness Lamonte Stallings, who saw petitioner and an accomplice leave the Herman residence immediately after shots had been fired. Stallings, 16 years old at the time of the shooting, was walking with a companion, Fernando Rojos, in the vicinity at the time.

He testified that he heard the breaking of glass and shots, and that they crossed the street and saw a man run out of the building and down the street. He then saw another man come downstairs. At the time, Stallings was "almost in front of the door," was able to see the man's face, the light conditions being "visible," and identified that person as the petitioner. When he saw the perpetrator come down the steps from the doorway, Stallings said to him, "Oh, I thought something happened" the petitioner at that point was looking at him at an angle. He testified further that as petitioner came down the stairs, he (Stallings) was looking up; the petitioner proceeded down at an angle and when he reached the bottom of the stairs "he had to turn his head a little to look at me from the corner of his eye," giving Stallings "a little more than a side view," and that he observed him for a matter of seconds.

On the day following the shooting, Stallings went to the police headquarters and looked through police identification files. The photograph of petitioner was not available, since it had been earlier provided to the F.B.I. agent, and Stallings picked out a photograph of one Ralph Hill as most resembling the person he had seen the night before. That photograph bore a striking resemblance to petitioner.

A few days later, Stallings was brought to police headquarters by a police officer who had seen him on the street carrying what turned out to be a toy pistol. Petitioner was also at police headquarters that day on a warrant issued relevant to an unrelated matter.

Stallings testified that when he was at police headquarters, "as I went through the door I had saw, I recognized the man that I had saw that night." This occurred while the witness was walking in and before he gave a statement, while defendant was in one room and the detectives in another. The witness testified that he obtained the same view of petitioner as he had of the person he observed exiting the Herman residence:

> [T]he way he looked at me when he was coming down the steps and the angle at which he came down the steps. He was off to this side in a room and I was coming in. He was like looking over like this. When I walked in I took a couple of steps, I just looked around. As I looked over this way, all of a sudden I remembered that it flashed back that it was the same guy I saw that night. The moment I saw him I realized inside I seen him coming down the steps and looking at me, the same way he did that night.

Stallings then informed a detective, who showed him five photographs, including one taken that day of petitioner relative to his having been picked up on another charge. Stallings identified petitioner, whom he had just seen and pointed out, as noted above.

Thus the initial identification of petitioner by Stallings amounted to an on-the-scene confrontation, made as the result of a fortuitous meeting between Stallings and peti-

tioner, who were present at the police headquarters for separate reasons.

In this light, it is submitted that the photographic identification made of petitioner by Stallings was not significant, since he had already pointed out petitioner a short time earlier, and the photograph was taken the same day. It can hardly be argued that the photographic identification was so impermissibly suggestive as to give rise to a subsequent likelihood of irreparable misidentification. In these circumstances, the fact that the photograph of petitioner was slightly larger than the other four, which were otherwise non-objectionable, would be equivocal.

As pointed out by the New Jersey Supreme Court, the identification of petitioner by Stallings, both photographic and in-person, was made the subject of exhaustive *voir dire* and trial cross-examination, and the validity of his identification was for the trier-of-fact.

The other identification witness, Fernando Rojas, also placed petitioner at the scene at the time of the shooting. His testimony paralleled that of Stallings, and he added that petitioner was the second man to exit the premises, that "the second one looked at me and I looked at him." He stated that there was a light inside the doorway from which the two men exited, and he was clearly able to see the face of the second man whom he identified as petitioner.

A few days later, Rojas was brought to police headquarters, where he was shown the five photographs previously shown Stallings, and likewise identified that of petitioner as being of the perpetrators he had seen on the night of the shooting. He then identified petitioner in person as he sat with three other individuals. The latter testimony was not allowed before the jury, however. Neither was Rojas permitted to identify petitioner in court.

Thus, Rojas identified petitioner from among five photographs, and in person from among four individuals of similar general appearance, all without apparent difficulty. He then further positively identified petitioner in court on *voir dire,* and was exhaustively cross-examined by defense counsel as to the identification procedure and as to his observation of petitioner at the scene of the crime.

The contention advanced by petitioner that Rojas might not have had ample time or opportunity to observe petitioner at the scene of the offense in order to base an identification was properly directed to the weight to be accorded identification by the trier of facts, rather than to the admissibility of such evidence.

In the context of the totality of the circumstances of the identification of petitioner by the various witnesses, it cannot be said that the procedures employed were such as to be violative of the guidelines set out in *Stovall* v. *Denno, supra,* and *Simmons* v. *United States, supra.*

POINT II

No issue relating to line-up identification is raised by the record in this case.

As a reason for the grant of a writ of certiorari in this matter, petitioner urges the necessity of a ruling by this Court that investigating authorities conduct lineups in all cases "where it is otherwise feasible and no urgent necessity obtains which would excuse it being held." While we agree that in a given situation, the use of a lineup is appropriate and even desirable as an aid in providing a fair and reliable identification procedure, we do not recognize the need for a directive by this Court as far sweeping as that requested by petitioner.

Furthermore, any ruling relating to lineups would be inappropriate in this matter, since no such issue is raised upon the record of the trial proceedings.

With respect to State witness Lamonte Stallings, the record will disclose, as previously recounted, that his identification of petitioner occurred not because he was brought to police headquarters to view and possibly identify petitioner, but as the result of a fortuitous encounter when he was arrested by a uniformed officer for carrying a pistol which turned out to be a toy. Having then identified Farrow, it is speculative to surmise what benefit would have derived to petitioner as the result of a subsequent lineup.

It should be noted that petitioner was not charged, arrested or indicted for the subject offense until many months after the time he was identified by Stallings and Rojas as the person they had seen leaving the premises on the night of the shooting. His presence at police headquarters was the result of his being picked up on a warrant arising from an unrelated offense, and at the time these two witnesses identified him, he was only one of several possible suspects in a wide-ranging investigation.

Petitioner was identified also by witness Rojas, who viewed him sitting with three other persons of similar general appearance. However, testimony relative to this identification was excluded from the jury, because the trial court at that time believed that there was a question as to whether assistance of counsel was required for pre-indictment line-up proceedings. See *Kirby* v. *Illinois,* 406 U. S. 682 (1972).

Thus, in effect there was a lineup conducted, the result of which would have been detrimental to petitioner's case, but which was excluded by the trial court. He thus cannot

now claim error in the failure of the police to have conducted a lineup.

With respect to the other witness, Paul Shaver, who made a photographic identification of petitioner, it would not have been feasible to have conducted a lineup prior to the photographic identification, under the circumstances. In fact, the procedure which was employed to obtain a lead on the perpetrator at the inception of the investigation in this case, points out the appropriateness of photographic identification in applicable situations, and negates a blanket requirement that the police conduct lineups in each instance.

POINT III

There is no compulsory right to assistance of counsel at a photographic identification procedure prior to the initiation of adversary judicial proceedings against a suspect.

For this proposition, we rely upon the holding of this Court in *Kirby* v. *Illinois, supra,* which applied to a lineup situation, but which we contend logically must apply as well to a photographic identification procedure. We rely as well upon the opinion of the New Jersey Supreme Court in the subject case, as to this question. Finally, this issue, if need be can be further clarified by this Court in the matter of *United States* v. *Ash,* 461 F. 2d 92 (D. C. Cir. 1972) where this Court has already granted a writ of certiorari, 407 U. S. 909 (1972).

CONCLUSION

For the reasons above stated, the petition for Writ of Certiorari should be denied.

Respectfully submitted,

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